AN UNPUNISHED CONSTITUTIONAL CRIME.

If a student of the science of government while examining the organic law of a State, with whose politics, manners, and customs he was unfamiliar, should find a single crime, defined and denounced in its Constitution, what would be his natural conclusion as to the light in which the crime was regarded by the people themselves, and as to its prevalence in their political society? He would conclude, of course, that such a crime was considered fatal to the life of the State and dangerous to the liberties and rights of the people; and that on that account the People themselves, unwilling to trust their legislature to define it and to provide for its punishment, had incorporated it in the fundamental law, by virtue of which the State itself existed and was held together. He would then conclude that a crime so dangerous as to be thought worthy of constitutional denunciation, must necessarily be infrequently committed. He would naturally say to himself: "Here is one crime at least which, among this virtuous people, can hardly exist. The people themselves have made it odious and detestable by condemning it in the very charter of the State. None but the most abandoned citizen will ever venture to commit it, for no one, known or even suspected to have been guilty of it, will surely be tolerated in a political society which has so condemned it. Among such a people such a man must be nothing but a moral leper, from whom all decent citizens turn in disgust."

What, then, would be our student's surprise, how great his bewilderment, if, turning from the study of their Constitution and laws to an examination of the actual political and social condition of the same people, he should discover that this particular crime, so defined, so denounced, so made odious and detestable, was not of infrequent, but of constant commission, that men suspected of it were not thrust aside, but very often re-elected to high official position; that some citizens plied it as a trade; that others lived and grew rich by it; and that although it was the *one crime* de-

nounced in the Constitution, it was also the *one crime* most prevalent and the *one crime* most rarely prosecuted or punished.

Yet that is exactly what our student would find if, after reading the Constitution of the State of New York, he busied himself to examine the condition of our political society and the records of our criminal courts.

The Constitution of the State of New York contains one entire article devoted to a definition of the crime of bribery, and to the means of punishing it. The Constitution will be read in vain to find any other crime either defined or denounced.

The article, which is short but comprehensive, reads as follows :

ARTICLE XV.

"1. Any person holding office under the laws of this State, who, except in payment of his legal salary, fees, or perquisites, shall receive or consent to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony. This section shall not affect the validity of any existing statute in relation to the offense of bribery.

"2. Any person who shall offer or promise a bribe to an officer if it shall be received shall be deemed guilty of a felony and liable to punishment except as herein provided. No person offering a bribe shall upon any prosecution of the officer for receiving such bribe be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving or offering of such a bribe. Any person who shall offer or promise a bribe, if it shall be rejected by the officer to whom it is tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared to be a felony.

"3. Any person charged with receiving a bribe or with offering a bribe shall be permitted to testify in his own behalf, in any civil or criminal prosecution therefor.

"4. Any district-attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge shall be removed from office by the Governor after due notice and an opportunity of being heard in his defense. The expenses which shall be incurred by any county in investigating and prosecuting any charges of bribery or attempting to bribe any person holding office under the laws of this State, within such county, or of receiving bribes by any such person in said county, shall be a charge against the State, and their payment by the State provided for by law."

Provisions relating to particular crimes are seldom met with in the Constitutions of any of the States which form the Federal Union.

The Constitution of the United States, it is true, defines the crime of treason. In the Constitution of Mississippi, Iowa, and

other of the Southern and Western States are articles denouncing dueling. The Constitutions of Texas, Tennessee, Nevada, Florida, and Vermont, and of one or two others, contain provisions condemning the bribery of electors. But in the organic law of but six States is there any reference to the crimes of giving bribes to public officers, or of receiving bribes by them.

The Constitution of California has an article relating to bribery of members of the Legislature only. (Article V., Section 35.) That of Colorado defines the crime of receiving bribes by public officers, but makes no provision for the punishment of bribe-giving. (Article XII., Section 6.) The Constitution of Alabama defines bribery by members of the Legislature, makes penal the giving or offering a bribe to any officer, whether legislative, executive, or judicial, and condemns as a felony the practice known as lobbying. (Article IV., Sections 40, 41, 42.) By Section 5,022 of the Constitution of Georgia lobbying is declared to be a crime, and the General Assembly is instructed to enforce the provision by suitable penalties. In the Constitution of Maryland may be found one article imposing upon the Legislature the duty of passing adequate laws for the punishment of bribery, and another compelling persons implicated in the crime to testify against each other. (Rule V., Article III., Section 50.) And in the Constitution of Pennsylvania are several sections resembling in many respects the Fifteenth Article of the New York Constitution, but by no means as sweeping and explicit. (Article III., Sections 29–32.)

In the Constitution of no other State in the Union can there be found any such comprehensive and specific provisions, not only in respect to the acts constituting the crime, the persons who may commit it, or the means devised for bringing offenders to justice, as are contained in the Constitution of the State of New York.

The first effort to incorporate an article directed against bribery in the Constitution of New York was made by the Constitutional Convention of 1867.

Soon after the Convention assembled at Albany, on the 4th of June, 1867, a Committee on official corruption was appointed. The Committee having been authorized to take testimony, summoned before it witnesses who furnished it with a partial view only of the widespread corruption, which every one at all

familiar with public affairs knew to exist. Soon after, the Committee reported to the Convention an amendment to the Constitution, which, with some changes, was adopted by the Convention, and became a part of the proposed new Constitution of the State.

The first section of the amendment defined the crime of bribery in the same terms as those in which it is defined in the present article. But the second section was indeed a remarkable one. It ran as follows :

"Any person offering a bribe, if it shall be accepted, shall not be liable to civil or criminal prosecution therefor. But any person who offers or promises a bribe, if it shall be rejected by the officer to whom it was tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared to be a felony, and a conviction shall be punished as provided in the first section of this article."

In a word, the offering of a bribe to a public officer was a felony, provided only it was not accepted. If it was accepted, the giver was free from all criminality.

This was indeed a startling innovation ! But, startling as it was, the Convention was persuaded to recommend its adoption by the people.

The reasons given by the committee for the adoption of any constitutional provision at all did not attribute any lack of efficacy to the existing laws, except in one particular. In some respects, notably as to punishments, they were more stringent than those proposed by the committee. But, stringent as they were, they were conceded to be dead letters. The committee, therefore, argued that if this particular crime was taken out of the great body of the statutes, and defined and denounced in the fundamental law, its appearance there would be a constant reminder to the People of the dangerous character of the crime, and would increase their just detestation of all who dared to commit it. It was further argued that once in the Constitution it would forever be beyond the reach of the Legislature to modify or repeal.

The fault found with the existing law, under which no one had ever been convicted, inspired the committee to recommend immunity to the givers of accepted bribes. "Experience teaches us," said, in effect, the sponsors of the measure in the Convention, "that it is impossible to punish both bribe taker and bribe giver. We cannot punish both. Let us, therefore, make sure of one. And inasmuch as the bribe taker, being a public officer, not only commits a crime, but betrays his trust

and violates his oath of office, let us single him out for punishment. The bribe giver, who has committed no crime, may then be used as a witness against him, and, being free from guilt himself, will not hesitate to testify. And he will be an unspotted witness, upon whose testimony the State may justly rely. On the other hand, the virtue of our officials shall be protected. For an offer of a bribe to one of them shall be criminal, provided he has the honesty to refuse it."

Those who opposed the adoption of this provision insisted that the existing laws which made bribe giving and bribe taking alike criminal, and compelled one offender to testify against the other were, if vigorously enforced by district attorneys, much more likely to lead to the suppression of the crime than the rules proposed by the Committee; that it was unjustifiable, at a period in our history when great corporations were making a business of trafficking in the votes of dishonest legislators, to make the acts of their officers blameless, and those of the official only, criminal; that the character of an official was quickly investigated by those whose occupation it was to buy and sell men; that corrupt proposals were not likely to be made to men of ascertained integrity, and that a provision making the giving of an accepted bribe innocent before the law, was calculated not to suppress the crime, but to increase it, because one of the parties at least to the corrupt transaction might practice his wickedness with perfect impunity.

As might have been expected, when this article, which was adopted by the Convention, was submitted to the People at the general election of 1869, it was rejected by a considerable majority. The People of this State were unwilling to license the paying of bribes to their dishonest officials.

Yet, curiously enough, and as if to illustrate the necessity of putting the laws against bribery forever beyond the power of the Legislature to alter or amend them, the Tweed Legislature of 1869, a few months before this article was rejected by the people, passed a law (Chapter 742 of the Laws or 1869) which embodied that feature of the proposed amendment which granted immunity to all bribe givers, and added a provision which made it simply impossible to convict the bribe taker.

The act was ironically entitled, "An act for the more effectual suppression of bribery." It might with greater propriety have

been entitled, "An act for the license of bribery." It reduced the then existing punishment from not exceeding ten to not exceeding five years. It improved on the amendment proposed by the constitutional convention, which, of course, was designed to cover only future cases, by giving a clean bill of health to all past bribe givers, as well as to all future givers of accepted bribes. Their immunity was not conditioned upon the giving of testimony against the bribed official; it was without any condition or consideration of any sort.

Having thus pardoned all past bribe givers, and made bribe giving in the future innocent, the act proceeded to take care of the bribe taker by making a conviction for receiving a bribe almost impossible.

The only excuse for making bribe giving not criminal, the only reason ever urged upon the Constitutional Convention by the mistaken advocates of so preposterous a measure, was that the State might obtain clean and reliable testimony upon which to prosecute the corrupt official,—testimony which, uncorroborated, would satisfy a jury.

But the law of 1869, in its last section, provided that the bribe giver, although free from all guilt by the very terms of the act, should, nevertheless, be regarded as an accomplice of the bribe taker in a legal sense, and it prohibited the conviction of the latter unless the testimony of the bribe giver was corroborated in its material parts by other evidence. A moment's reflection will convince any one that such a rule, when applied to a prosecution for a secret crime in which usually but two persons are concerned, is an inevitable bar to any conviction.

This scandalous statute was the law of this State from 1869 to 1875, a period of about six years. It was the golden age of bribery. The crime flourished. The paying of bribes was absolutely innocent, and the taking of bribes absolutely safe.

From this unfortunate condition of affairs we were rescued by the Constitutional Commission of 1872, a body appointed by the Governor under an act of the Legislature of that year. To that body is due the credit of devising the article of our present Constitution, which was adopted by a vote of the people at the general election in November, 1874, and went into effect on the 1st day of January, 1875.

So that from the year 1875 down to the present day, we have

had in our fundamental law clear, ample, and stringent provisions against bribe giving and bribe taking, which only the People themselves may ever repeal, alter, or modify.

It is worth while, in passing, to notice some of the features of these unique provisions, for the purpose of observing how nicely they are calculated, if only vigorously enforced, to deal with the crime of bribery in all its aspects.

They affect all public officers, from the chief magistrate down to the humblest official.

They make the agreement to receive or the agreement to give, as criminal as the actual receipt or the actual giving. Unimportant as this may seem at first glance, the value of this feature may not be overlooked. In the first place, it makes the first step towards the completed crime, a crime itself. In the second, it renders conviction more probable; since it is easier to prove an agreement to receive than the actual receipt of the money. Usually no one can prove the latter but the giver, but the existence of a corrupt agreement to receive may be proved to the satisfaction of a jury by a variety of circumstances, which, taken together, point irresistibly to the guilt of the accused.

The article also makes the giver of bribes as guilty as the taker of bribes, but it permits *him* to purge himself of his offense *in one way and in no other*. He may go free if on the prosecution of the corrupt official he shall testify to the giving or offering of the bribe. And he is compelled to testify, whether he wishes to or not, against the bribe taker, upon the promise that revelation of the official's guilt shall work his own salvation.

The article also commands the District-Attorney in every county to prosecute all charges of bribery faithfully. He may not temporize or trifle, but *must* pursue those charged with the crime to the end. And if he does not, the Governor *must* remove him from office, after he has had an opportunity to be heard in his defense. In a secret crime, like bribery, there is usually no complainant. Both bribe giver and bribe taker are interested in suppressing the crime. To meet this difficulty, the District Attorney himself is made a complainant, upon pain of removal if he does not faithfully push his complaint.

Thus from the year 1853 to the year 1869 we find stringent statutes in the State of New York against bribery embodying

most of the features of the present article of the Constitution; and from the year 1875 down to the present day we find the sweeping Constitutional rules, supplemented, since the adoption of the Penal Code, by statutory provisions with the gravest penalties.

Indeed, it may justly be said that the laws against bribery in this State for more than thirty years (the interval from 1869–1875 excepted) have been almost Draconian in their severity.

With what result ?

In the debates in the Constitutional Convention of 1867 upon the proposed amendment to which I have made reference, it was conceded that the law against bribery was a dead letter. No one of the delegates to that Convention, although they came from every part of the State, could recollect a single conviction for either bribe taking or bribe giving, except one case in Ontario County, where, in the year 1867, some official pleaded guilty of taking a bribe and was fined one thousand dollars.

The digests of Brightly, Abbott, Barbour, and Cowan, containing the adjudications in all the courts upon every legal principle, and upon almost every statutory provision, may be read without finding, until the year 1886, a single case where a person was convicted of bribery, whether in taking or giving.

In almost every other State, cases are to be found in the volumes recording the decisions of its higher courts. There are many cases reported in Massachusetts, Texas, Illinois, Indiana, New Jersey, Pennsylvania, and California. But until 1886, in the State of New York alone, where the laws denouncing bribery have been the most stringent, and where for thirteen years an entire article of the Constitution has been devoted to the means of punishing the crime, no reported case of a conviction for bribery can be found.

Henry W. Jaehne, Arthur J. McQuade, and John O'Neil were the first persons in the history of this State who were incarcerated in any of its prisons for the offense of receiving bribes while public officials. The case of the People *vs.* Jaehne was the first case upon bribe taking ever decided by the Court of Appeals. And it is quite certain that no person before Jacob Sharp was ever convicted or tried in this State for the crime of giving a bribe to a public officer.

What a beggarly result for thirty years of statute framing and constitution making!

And the worst of it all is, that, so far as appears upon the surface, the crime is scarcely less prevalent, the criminals scarcely less audacious, than before these solemn warnings were recorded. On one occasion during the past year I asked a distinguished citizen, residing in one of the cities of the State, whether these convictions had not had a salutary effect in repressing the crime. He answered that a friend of his who had recently had some dealings with the Common Council of his city, had told him that shortly after the Aldermanic trials he had made some application to that body, and was surprised at the increase in price for votes which was demanded. Venturing to remonstrate, he was told that since the convictions the price had been put up, because of the increased risk of the business.

This was the only information he could impart, as to the effect of the prosecutions in that particular city.

But although it may not be perceptible nor capable of exact measurement, it may not be doubted that the effect of these trials upon those who make office-holding a trade, and upon politicians of the baser sort in general, has been very wholesome. For years must roll by, before even the seemingly flippant or audacious can forget the terrible lessons of 1886 and 1887. Their faith in the inefficacy of laws to deal with the crime has been rudely shattered. The record of half a century barren of prosecutions has been broken. The lesson has been learned that "dead letters" may, some time, become living laws.

There seems also to have been some little recognition in the politics of the State, one notable instance excepted, of the aroused public sentiment against bribery. Here and there re-nomination or re-election has been denied to those who so openly plied their unhallowed trade as to bring disgrace upon their party associations.

But hopeful as these signs are, we may not blind our eyes to the shameful fact that the crime flourishes, and will flourish none the less because a few unfortunates have been overtaken by the strong arm of the law. At the very moment when the Aldermanic prosecutions were being most vigorously pushed, when public indignation was at its highest pitch over the startling disclosures of official corruption, does any one doubt that legislation, yes, and justice, was being bought and sold—not so openly perhaps as before, but with greater security, because with greater secrecy? Is not the knowledge current among politicians and all acquainted

with public affairs in the State, that many men in official station who have made large sums of money by the sale of their votes and influence, are again and again re-elected to office? Will not the shameless trade in votes which year after year goes on in the halls of the Legislature of the State be resumed as soon as the business of the session commences?

Already many a legislator is looking forward to the rich harvest of the winter. Already he is figuring up the profits of the season. If he is a free lance, he is calculating what interest he had better "strike" first. If he is the representative of some corporation or trust, he is studying how he may serve his master with the largest profit to himself. He is dreaming already of "lifting the mortgage on the barn" or the house, of acquiring some interest-bearing shares, of "getting together" enough to open a saloon, to start a business, perhaps to organize a bank.

Already the kings and princes of the lobby have engaged their spacious apartments for the winter's campaign. Already they have classified the members of both houses, have calculated to a nicety the price of every venal man, either per bill or for the season, have estimated the value of statesmen whose reputation, or influence, or powers of speech, entitle them to higher rewards than their cheaper associates, and have begun the more difficult study of capturing those who cannot be approached directly with vulgar bribes, but may be reached in other safer and more convenient ways.

Already great corporations are beginning to set aside the annual fund for legislative purposes, which, when expended, will be entered as "sundries" or "legal expenses" in their books of accounts. And greedy speculators, anxious to lay their hands upon some of the great franchises of the State yet unsold, stand ready to submit to the extortions of the corrupt, to overcome the scruples of the hesitating, and to undermine the moral constitution of those who have not yet fallen victims to the disease.

In a few short weeks, when the legislatures of our State and cities convene, despite the solemn lessons of the past, the Constitution will again be defied and spat upon by the very people who helped to make it, and whose official lives serve to illustrate how vain and impotent after all are even its strong sections to stem the tide of corruption, which, unchecked, must ultimately submerge our free institutions.

DE LANCEY NICOLL.